IN THE SUPREME COURT
OF THE UNITED STATES

77-1633

TAMARA WEINSTEIN,

Petitioner

- against -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEAL FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

TAHERA WEINSTEIN,

Petitioner

- against -

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

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CITATIONS

There appear to be no cases construing 18 USC 1422 and apparently the decision with respect to its application is one of first impression.

Citations with respect to the unconstitutionality of 18 USC 1422 because of vagueness will be furnished in the appropriate briefs and memoranda in the event this petition is granted.

IN THE SUPREME COURT OF THE UNITED STATES

----------X

TAHERA WEINSTEIN,

Petitioner

- against -

UNITED STATES OF AMERICA,

Respondent

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in the above case on March 20, 1978. Application for an extension to file this petition was denied, but petitioner requests that this Court waive the filing time requirements sua sponte because of the facts and circumstances hereinafter set forth.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York has not been reported.

The opinion of the Court of Appeals for the Second Circuit has not been reported.

JURISDICTION

Copies of the judgments of the District Court of the Southern District of New York and of the Court of Appeals for the Second Circuit are attached to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted of violating 18 USC 1422 which provides that

> "Whoever knowingly demands, charges, solicits, collects, or receives, or agrees to charge, solicit, collect, or receive any other or additional fees or moneys in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized by law, shall be fined not more than $5000.00 or imprisoned not more than five years or both."

The question presented is: Whether the Petitioner's acts constituted a violation of 18 USC 1422.

STATEMENT

The petitioner admittedly received $800.00 from an alien upon the promise by petitioner to the alien to influence the speedy and favorable review by the Immigration and Naturalization Service (INS) of the alien's application for permanent resident status. In fact, however, after receiving the money, petitioner had the alien sign an INS application and did nothing more. It is uncontroverted that the INS application was never submitted to the INS.

At the trial of the indictment, the question of the applicability of the petitioner's acts to the statute defining the crime was raised. The District Court trial judge made cogent reference to the pendency of "a proceeding" as a prerequisite to the applicability of the criminal elements stated in the

statute (18 USC 1422). The Court stated to the prosecutor "Why put in the technical word 'proceeding' if the scope of this section is to encompass a defendant who has done what the defendant has done here?" This was at the conclusion of the trial.

The trial Court's decision of conviction stated that the petitioner was guilty of violating 18 USC 1422 beyond a reasonable doubt and in justifying the applicability of that section to petitioner's act, stated that the proceedings contemplated by that section commenced when the petitioner obtained the INS and had the alien sign them.

REASONS FOR GRANTING THE WRIT

That portion of the decision below, rejecting the contention that petitioner's acts did not constitute a violation of 18 USC 1422, should be reviewed because it not only erroneously interprets an already vague and therefore unconstitutional section but has violated the time-tested

rules concerning the application of penal statutes to those accused of violating them. The statute is too vague in defining when a crime is committed and the decision below is proof of that vagueness.

The petitioner herein admittedly treated the alien involved unfairly. There is no question that petitioner obtained the alien's funds under certain circumstances that later proved to border upon some type of misconduct.

But the question of whether the petitioner violated the section under which she was indicted must be resolved by carefully testing the petitioner's acts against the wording of the statute used. The use of the word "in proceedings" is inconclusive as to what type of proceeding is referred to. What is a proceeding in the administrative agencies, those quasi-judicial bodies that have no pleadings in the "proceeding" sense of the word, but only <u>applications</u>?

The petitioner did knowingly receive moneys from the alien. The relationship

between petitioner and the alien did revolve around a naturalization matter and the moneys received by petitioner were in excess of the statutory fees (recited elsewhere in the law) that could be charged or collected.

But were those moneys received by petitioner in connection with naturalization matter "in proceedings" relating to those matters, in the sense that any Court can define what proceedings are described?

The District Court intimated from the bench that it did not appear that proceedings were pending. It is doubtful that even the District Court had any formal proceedings in mind. It may have been referring to proceedings in the generic sense, referring to a procedure that had to be followed in INS applications. But there were in fact no proceedings in either or any sense. The District Court nevertheless thereafter fit facts to theory so as to draw petitioner's acts into the already

vague statutory language to accomplish a conviction, and then convicted petitioner. The Court below, on appeal, rejected the contention that the statute did not apply. It has set a precedent permitting an entire gamut of procedures to fall with the application of 18 USC 1422.

The statute must be revised before proper prosecution under its terms will result.

The decision of the Court below affirmed a misapplication of a vague statute and at its best approved a violation of all common sense and reason resulting in petitioner's wrongful conviction. The Congress must re-enact 18 USC 1422, using definitive terms so that the crime sought to be prevented is specifically described.

The question presented herein is of great recurring significance. If the decision below is affirmed, precedent will decide that a "proceeding" has commenced every time an application form, previously

obtained from the INS, is signed although never submitted. Countless events could take place after an application is signed and before it is submitted to the INS. If a "proceeding" is determined to have begun once such an INS application is signed, though not submitted, how is such a proceeding documented? How would the INS know it had a "proceeding" before it, if in fact it is a "proceeding" at all? At what point does a "proceeding" in the INS begin? A host of requirements must be satisfied between signing the application and submitting it to the INS. State and Federal agencies must endorse it with approvals from their labor departments and the application is then returned to the INS. Has a "proceeding" been commenced during the performance of those requirements? If an application is obtained, signed and then later abandoned by an alien, has a "proceeding" been commenced nonetheless? The statute does not define it and case law and statutory enactments are of no assistance, since case

law and statutes only refer to commencement of "proceedings" by formal pleadings in judicial proceedings.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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LOWER COURT DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March, 1978.

PRESENT:

HON. J. EDWARD LUMBARD

HON. WILLIAM H. TIMBERS

HON. MURRAY I. GURFEIN, Circuit Judges

----------X

UNITED STATES OF AMERICA,

Appellee,

- against -

TAHERA WEINSTEIN,

Defendant-Appellant.

----------X

77-1331

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States Court for the Southern District of New York,

and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the case be remanded to the District Court for a specific finding on whether appellant requested a lawyer three times and was refused permission to call a lawyer before the uncounselled interrogation on substantive matters by the Assistant United States Attorney began. If the District Court makes a finding that appellant's testimony at the suppression hearing that she made such requests is credible, then the admissions should have been suppressed, and, upon such finding, a new trial should be ordered. Upon a finding that no such requests for a lawyer were made, we would affirm on the District Court's finding of waiver during the interrogation in the United States Attorney's office.

The contention that the acts of appellant did not constitute a violation of 18 U.S.C. 1422 is rejected as being without merit.

The District Court is directed to

report its finding to this panel.

J. EDWARD LUMBARD

WILLIAM H. TIMBERS

MURRAY I. GURFEIN

Circuit Judges

No. 77-1633

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAHERA WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SIDNEY M. GLAZER,
MICHAEL E. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1633

TAHERA WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals remanding the case to the district court for additional findings on a suppression motion (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. On April 25, 1978, Mr. Justice Marshall denied an application for an extension of time for filing a petition for a writ of certiorari. The petition was not filed until May 8, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether the acts of petitioner in demanding and obtaining money from an alien were "in proceedings relating to naturalization" under 18 U.S.C. 1422.

STATUTE INVOLVED

18 U.S.C. 1422 provides:

> Whoever knowingly demands, charges, solicits, collects, or receives, or agrees to charge, solicit, collect, or receive any other or additional fees or moneys in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized by law, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

After waiving a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of receiving fees other than those prescribed by law "in proceedings relating to naturalization or citizenship or the registry of aliens," in violation of 18 U.S.C. 1422. She was sentenced to two years' probation and a $2,500 fine. The court of appeals, after rejecting the contention presented here, remanded the case for a finding on petitioner's allegation that she was denied the right to consult with counsel before making admissions (Br. 2-4). The district court was directed to grant the motion to suppress and to order a new trial if it sustained petitioner's claim; otherwise, the appellate court indicated it would affirm the conviction. On June 22, 1978, the district court rejected the claim (App., *infra*, p. 1a).[1] The court of appeals has not yet entered a final judgment.

The underlying facts are as follows. Yasmin Pirani, a Tanzanian national, entered the United States legally in April 1974 as a nonimmigrant visitor authorized to remain in the country for three months (Tr. 13). She

[1]We reproduce the order as an appendix to this brief.

subsequently obtained permission from the INS to extend her stay (Tr. 14). In August 1975, Pirani was introduced to petitioner by a mutual acquaintance (Tr. 17), and Pirani mentioned to petitioner that she (Pirani) would shortly be forced to leave the United States because her visitor's status was about to expire and she could not obtain another extension (Tr. 18). Claiming to have influence with INS officials, petitioner told Pirani not to worry (Tr. 19).

A few weeks later, petitioner advised Pirani that $300 was required to begin the process (Tr. 23). Before paying petitioner the money, Pirani signed in blank several INS forms obtained for her by petitioner (Tr. 22), the completion of which constitutes the first step for securing an adjustment of status from the agency (Tr. 6). Pirani left the signed forms with petitioner for filing (Tr. 21), and later paid petitioner an additional $500 to complete the transaction (Tr. 24-27).

Petitioner kept the money and never filed the forms. In response to Pirani's repeated inquiries about the progress of her application for an adjustment of status, petitioner blamed the delay on bureaucratic red-tape at the INS (Tr. 22). In May 1976, during questioning by INS investigators about another immigration matter, Pirani disclosed her dealings with petitioner (Tr. 29). Pirani cooperated in the ensuing investigation by agreeing to tape-record several of her telephone conversations with petitioner. During the taped conversations, petitioner represented to Pirani that the $800 had been used to bribe a highly placed "contact" at INS who was working to expedite the adjustment of status application (Govt. Exh. 5 and 6; Tr. 32, 35). Once, in response to Pirani's threat to go to the authorities if the money was not returned, petitioner stated that someone had reported Pirani to the INS as an undesirable alien and that any attempt by Pirani to register a complaint with the agency would "only make trouble for yourself" (Govt. Exh. 7; Tr. 39; Br. 15).

After the arrest, petitioner admitted that she had taken the $800 "to help [Pirani] secure her citizenship papers to remain in the United States" but gave conflicting accounts about what she had done with the money (Tr. 94).

ARGUMENT

Petitioner contends that her solicitation and receipt of the unauthorized payments from Pirani for the purpose of bribing INS officials to secure an adjustment-of-status for Pirani did not occur "in proceedings relating to naturalization" as required by 18 U.S.C. 1422 because petitioner never filed the INS forms that Pirani signed with any government agency.

1. When it was filed, the petition for certiorari was premature in light of the remand order by the court of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251. We do not interpose that objection at this stage, however, since the motion to suppress has failed and the court of appeals has indicated its intention to affirm the conviction without further hearing. Accordingly, we address the merits of the claim presented by the petition.

2. We submit petitioner is in error in contending that her fraud was not covered by 18 U.S.C. 1422. The statute was enacted in large part to curb the predatory exploitation of aliens seeking protection and benefits under the immigration and naturalization laws.[2]

[2]The earliest version of the statute was contained in the Act establishing a Bureau of Immigration and Naturalization. It prohibited the collection of excessive fees in naturalization matters by "any clerk of any court or his authorized deputy or assistant." 34 Stat. 602. By establishing a fixed schedule of fees and punishing the collection of any moneys other than those authorized, the Act sought to remove the financial incentive for corrupt and lax administration of the immigration and naturalization laws by court officials as well as to insure "that all aliens applying for citizenship shall be subject to the same expense." H.R. Doc. No. 46, 59th Cong., 1st Sess. 25 (1905). The provision was extended in the Nationality Act of 1940, 54 Stat. 1137, to cover "any * * * person * * * whether an employee of the Government * * * or not." 8 U.S.C. (1940 ed.) 746(a)(33). The statute took its present form and was transferred to the criminal code in 1948. 62 Stat. See H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947).

Petitioner does not dispute that obtaining an adjustment of status is a proceeding "relating to naturalization or citizenship or the registry of aliens" under the statute. See *United States* v. *Schaier*, 175 F. Supp. 838 (S.D. N.Y.). Nor does she challenge that the moneys she collected from Pirani were beyond those authorized by law. See 8 C.F.R. 103.7.

Petitioner was plainly engaged in such a scheme and the fraud was complete once petitioner had solicited and received the unauthorized moneys from Pirani by falsely representing that they were necessary to secure a favorable disposition of her application for an adjustment of status.

Petitioner's subsequent failure to file the forms as she had agreed to do did not immunize her from prosecution under the statute. The protection to aliens afforded by the statute would be fatally undermined if a collector of unauthorized fees could escape its penalities simply by electing to compound the fraud by refusing to perform the services for which the payment was given. Both courts below correctly concluded that Congress could not have intended its statutory scheme to be so easily evaded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SIDNEY M. GLAZER,
MICHAEL E. MOORE,
Attorneys.

JULY 1978.

APPENDIX

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
against
TAHERA WEINSTEIN,

Defendant.

77 Cr. 66 (CMM) No. 47334

METZNER, D.J.:

The Court of Appeals has remanded the above matter to this court for a specific finding "on whether appellant requested a lawyer three times and was refused permission to call a lawyer before the uncounselled interrogation on substantive matters by the Assistant United States Attorney began."

I find that the appellant did not make a request for a lawyer, nor was she refused permission to call a lawyer. She did ask, "will I be permitted to call an attorney? I [Assistant United States Attorney] said yes." However, she did not follow up this inquiry with a request for permission to call an attorney.

So ordered.

Dated: New York, N.Y.
June 21, 1978

/s/ Charles M. Metzner

U.S.D.J.